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NAILI HOLDINGS SDN BHD v. SABELLA HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[SUIT NO: WA-22IP-84-12-2020]
7 APRIL 2025

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Abstract – *(i) In a case that raises a fundamental question as to what extent should a party, that has invested time and effort in creating a unique design be compensated when another unjustly benefits from its work, courts must determine compensation through the prism of reasonableness, adopt an approach that ensures restitution aligns with commercial realism, eschewing both speculative windfalls and undue leniency as well as reaching a percentage that neither penalises the infringer excessively nor trivialises the owner's intellectual property rights; (ii) If an infringer not only infringes an owner's registered industrial design but did so deliberately and without remorse, and its actions are a calculated exploitation for commercial gain, aggravated and exemplary damages ought to be awarded.*

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INTELLECTUAL PROPERTY: *Infringement – Registered design – Assessment of damages – Whether there was proof of actual loss of profit – Whether figures ought to be professionally verified – Fair royalty – Whether infringement of design done deliberately – Whether calculated exploitation of intellectual property for commercial gain – Whether aggravated and exemplary damages should be awarded*

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DAMAGES: *Assessment – Infringement of registered design – Whether there was proof of actual loss of profit – Whether figures ought to be professionally verified – Fair royalty – Whether aggravated and exemplary damages should be awarded*

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The plaintiff was a company engaged in the art and business of designing garments, particularly batik-style clothing. Recognising the value of its creation, it took steps to secure legal protection for its design. The plaintiff proceeded to commercialise this design under the name 'Coral Orchid', launching its sales in February 2020. In September 2020, the defendant, a well-established garment manufacturer, introduced three clothing products, eerily similar to the plaintiff's registered design. These garments, labeled as 'Cherry Floral', 'Navy Floral' and 'Yellow Floral', found their way into the marketplace, bearing the same artistic elements for which the plaintiff had sought protection. The defendant did not stop at mere production; it actively advertised, marketed and sold these garments across multiple platforms, including online stores and social media. The plaintiff, upon discovering this, turned to the courts for redress. A full trial ensued, and a judge ruled in favour of the plaintiff, by holding that the defendant had infringed the

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plaintiff's registered industrial design and violated its exclusive rights. As a result, a permanent injunction was granted, forbidding the defendant from further use of the design. The plaintiff subsequently filed for assessment of damages in accordance with a notice issued under O. 37 r. 1 of the Rules of Court 2012 wherein they sought RM1,908,000 which included general damages as well as aggravated and exemplary damages. At its core, this case raised a fundamental question: to what extent should a party that had invested time and effort in creating a unique design be compensated when another unjustly benefited from its work. The issues that arose were (i) whether the plaintiff proved actual loss of profit; (ii) how should the compensation be calculated; and (iii) should aggravated and exemplary damages be awarded.

Held (ordering accordingly):

(1) The plaintiff, in asserting that had it not been for the defendant's infringement, the plaintiff would have enjoyed greater sales and market share, even went so far as to estimate that the defendant had sold 24,000 pieces, which, if sold at full price, would have generated RM3,816,000 in revenue. The evidence produced was, however, unconvincing as it primarily relied on publicly accessible online communications, which could well have been an attempt to exaggerate sales figures as part of a marketing strategy rather than a true reflection of actual transactions. The plaintiff failed to produce evidence of sales in respect of the registered designs, its percentage progress of sales, profit before tax, and losses due to the infringed design. Furthermore, the plaintiff's assertion of entitlement to 50% of the sum of RM3,816,000 was entirely without foundation. The plaintiff's reliance on the defendant's recommended sale price, social media account, and promotional video was, at best, tenuous and wholly insufficient in the absence of concrete sales figures. (paras 25 & 26)

(2) The plaintiff had every opportunity to invoke the discovery process to obtain documentary proof of the defendant's actual sales and profit margins but elected not to do so. This omission was a significant lapse. Conversely, the defendant had presented sales figures verified by its appointed chartered accountant, indicating that only 6,067 units of the infringing designs were sold, generating a total revenue of RM395,291. In the absence of any credible evidence to the contrary, these figures must be accepted as conclusive. The burden was on the plaintiff to challenge or disprove this evidence through proper means, yet no such effort was made. (paras 27 & 28)

(3) In scenarios where neither a normative profit margin nor an established licensing regime exists, damages must be calibrated to reflect a hypothetically negotiated royalty rate – a sum a willing licensor and

licensee would reasonably agree upon for the infringing acts. The plaintiff failed to substantiate quantifiable profit losses and lacked any discernible practice of royalty-based licensing. Consequently, the court must determine compensation through the prism of reasonableness: what sum would the parties have fairly bargained for, *ex ante*, to legitimise the defendant's unauthorised exploitation of the design? This approach ensures restitution aligns with commercial realism, eschewing both speculative windfalls and undue leniency. (paras 32 & 33)

(4) In considering what was fair royalty, the figure of 15% of the defendant's revenue was an appropriate measure. The same was a fair estimation of compensation grounded in a balanced synthesis of equitable principles and pragmatic commercial reasoning. Given the defendant's documented revenue of RM395,291 from the sale of 6,067 infringing garments, the 15% benchmark aligned with the jurisprudential mandate to approximate a hypothetical licensing agreement that fairly balanced the interests of both parties. This percentage neither penalised the defendant excessively nor trivialised the plaintiff's intellectual property rights, reflecting a judicious middle ground that acknowledged the inherent value of the design while respecting the defendant's actual commercial gains. The rate accounted for industry norms, where royalty percentages for design or patent licensing often range between 10% and 20%, depending on factors such as market demand, profit margins, and the uniqueness of the protected work. By anchoring the calculation to the defendant's actual revenue – rather than the plaintiff's speculative projections – the court ensured proportionality and transparency. The resultant sum of RM59,293.65 (15% of RM395,291) thus served as a rational and restorative measure, compensating the plaintiff for the unauthorised exploitation of their design while adhering to the evidentiary constraints of the case. (paras 34 & 35)

(5) While injured feelings represent one aspect of aggravated damages, the critical determinant is whether the injury was exacerbated by malice, insolence, or an egregious manner of execution. The defendant had not only infringed the plaintiff's registered industrial design but did so deliberately, persistently, and without remorse. Despite being aware of the plaintiff's design rights, the defendant proceeded to market, advertise, and profit from the infringing product on a large scale, leveraging social media, e-commerce platforms, and physical advertising to maximise sales. Hence, the plaintiff herein was entitled to aggravated damages to reflect the added injury caused by malicious or high-handed behaviour. An award of RM50,000 commensurate with the severity of the injury suffered. (paras 40 & 41)

(6) The defendant's actions were neither inadvertent nor a matter of oversight. Rather, they constituted a calculated and deliberate exploitation of the plaintiff's intellectual property for commercial gain. Rather than merely defending against the plaintiff's claims, the defendant actively sought to invalidate the plaintiff's intellectual property rights, reinforcing the view that its actions were not only intentional but also aimed at eliminating any obstacle to its commercial objectives. Intellectual property rights must not be rendered meaningless by allowing infringers to merely absorb the consequences as a negligible expense. To prevent the systemic exploitation of intellectual property and to ensure that infringement was not simply treated as a 'cost of doing business', courts must intervene decisively. To reflect the egregious nature of the defendant's conduct and to deter future infringements of this kind, an award of RM100,000 in exemplary damages was imposed. (paras 50 & 51)

Case(s) referred to:

Collins Stewart Ltd v. The Financial Times Ltd [2005] EWHC 262 ***(refd)***
Dormeuil Freres SA & Anor v. Feraglow Ltd & Anor [1990] RPC 449 ***(refd)***
Eaton Mansions (Westminster) Ltd v. Stinger Compania De Inversion SA [2013] EWCA Civ 1308 ***(refd)***
General Tire And Rubber Co v. Firestone Tire And Rubber Co Ltd [1975] WLR 819 ***(refd)***
Guangdong Foodstuffs Import & Export (Group) Corporation v. Tung Fook Chinese Wine (1982) Co Ltd And Another HCA011061A/1995 ***(refd)***
Leather Cloth Company v. Hirschfield (1865) LR 1 Eq 299 ***(refd)***
Messenger Newspapers Group v. National Graphical Association [1984] IRLR 397 ***(refd)***
Naili Holdings Sdn Bhd v. Sabella Holdings Sdn Bhd [2025] CLJU 224 HC ***(refd)***
Pneumatic Tyre Co Ltd v. Puncture Proof Pneumatic Tyre Co Ltd (1899) 16 RPC 209 ***(refd)***
Prince Manufacturing Inc And Another v. ABAC Corporation Australia Pty Ltd And Another (1984) 57 ALR 159 ***(refd)***
Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] CLJU 500; [2017] 1 LNS 500 CA ***(refd)***
Spalding (AG) & Bros v. AW Gamage Ltd And Benetfink & Co Ltd [1915] 32 RPC 27 ***(refd)***
Taiping Poly (M) Sdn Bhd v. Wong Fook Toh & Ors [2011] 3 CLJ 837 FC ***(refd)***
The United Horse-Shoe And Nail Co Ltd v. John Stewart And Co (1888) 5 RPC 260 ***(refd)***
Wembley Gypsum Products Sdn Bhd v. MST Industrial Systems Sdn Bhd [2007] 6 CLJ 228 CA ***(refd)***

Legislation referred to:

Industrial Designs Act 1996, s. 35(1), (3)
Rules of Court 2012, O. 37 r. 1

Other source(s) referred to:

McGregor on Damages, 16th edn, pp 1261-1262, paras 1947-1948

A *For the plaintiff - Haris Md Nor; M/s Adnan Sharida & Assocs*
For the defendant - Azmer Md Saad & Nur Zalikha Noor Kashfi; M/s Lainah Yaacob & Zulkepli

Reported by Suhainah Wahiduddin

B **JUDGMENT**

Yusrin Faidz Yusoff JC:

Introduction

[1] This judgment concerns the assessment of damages in encl. 64, following the court's decision in favour of the plaintiff in an industrial design infringement claim. At its core, the case raises a fundamental question: to what extent should a party that has invested time and effort in creating a unique design be compensated when another unjustly benefits from its work?

Background Facts

D **[2]** The plaintiff, Naili Holdings Sdn Bhd, is a company engaged in the art and business of designing garments, particularly batik-style clothing. Recognising the value of its creation, it took steps to secure legal protection for its design, duly registering it under Industrial Design No. MY20-00070-0101 on 31 January 2020. The design was not merely ornamental; it was the E product of careful thought, intricate craftsmanship, and a desire to bring something novel to the marketplace. The plaintiff proceeded to commercialise this design under the name "Coral Orchid", launching its sales in February 2020.

F **[3]** Some months later, in September 2020, the defendant, Sabella Holding Sdn Bhd, a well-established garment manufacturer, introduced three clothing products, eerily similar to the plaintiff's registered design. These garments, labeled as Cherry Floral, Navy Floral, and Yellow Floral, found their way into the marketplace, bearing the same artistic elements for which the plaintiff had sought protection. The defendant did not stop at mere G production; it actively advertised, marketed, and sold these garments across multiple platforms, including online stores and social media.

[4] The plaintiff, upon discovering this, turned to the courts for redress. A full trial ensued, and on 10 October 2023, Justice Dato' Mohd Radzi Harun ruled in favour of the plaintiff (See: *Naili Holdings Sdn Bhd v. Sabella* H *Holdings Sdn Bhd* [2025] CLJU 224; [2025] MLJU 301). In essence, my predecessor held that the defendant had infringed the plaintiff's registered industrial design, thereby violating its exclusive rights. As a result, a permanent injunction was granted, forbidding the defendant from further use of the design.

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[5] The plaintiff subsequently filed for assessment of damages in accordance with a notice issued under O. 37 r. 1 of the Rules of Court 2012 ('the Rules'), wherein they sought the sum of RM1,908,000 which includes general damages as well as aggravated and exemplary damages. This is based on para. (iv) of my predecessor's judgment which reads as follows:

> iv. Satu siasatan ke atas gantirugi atau di atas pilihan Plaintif, satu akaun keuntungan yang dibuat oleh Defendan akibat pelanggaran Pendaftaran Reka Bentuk Perindustrian Malaysia No. MY20-00070-0101 dan bayaran mana-mana jumlah yang mungkin didapati hasil siasatan tersebut kepada Plaintif;

[6] Following an assessment of damages, I granted the total sum of RM209,293.65 along with assessment costs of RM8,000, in favour of the plaintiff. My decision encompasses the following:

(i) general damages in the sum of RM59,293.65;

(ii) aggravated damages in the sum of RM50,000; and

(iii) exemplary damages in the sum of RM100,000.

[7] In addition to the foregoing, the plaintiff proposed, and the defendant agreed, to the sum of RM20,000 as costs for the full trial of the main claim. Accordingly, this amount is recorded as such, in addition to the RM20,000 previously awarded by my predecessor for the dismissal of the defendant's counterclaim.

[8] Essentially, the defendant, *vide* their notice of appeal dated 25 November 2024, is appealing against my decision granting the aforesaid sum of RM209,293.65.

Issues

[9] The court is faced with three principal issues:

(i) did the plaintiff prove actual loss of profit?

(ii) how should compensation be calculated?

(iii) should aggravated and exemplary damages be awarded?

Counsels' Contentions

Plaintiff's Contentions

[10] Learned counsel for the plaintiff, Haris bin Md Nor, contends that substantial damages should be awarded to compensate for its financial loss, reputational harm, and the defendant's unjust enrichment.

[11] Counsel argues that the defendant wrongfully appropriated the plaintiff's design in September 2020, producing and selling garments under the names Cherry Floral, Navy Floral, and Yellow Floral, without any

permission or licensing from the plaintiff. It is claimed that the infringement had the effect of diluting the uniqueness of the plaintiff's design, allowing the defendant to unfairly compete in the same market space.

[12] The claim for damages is premised upon the assertion that the defendant's sales directly impacted its revenue. Learned counsel for the plaintiff argued that had the defendant not sold the infringing garments, it would have enjoyed higher sales and profitability.

[13] The plaintiff asserted that the defendant did not merely sell infringing products – it actively and extensively promoted them, thereby maximising its profits. It is argued that the defendant leveraged online platforms, including Shopee, Facebook, Instagram, and Carousell, to market its infringing garments. Additionally, the defendant invested in billboard and radio advertisements, creating the perception that it was the legitimate owner of the design. This aggressive promotional effort, the plaintiff contended, magnified the damage caused, as it effectively pushed the plaintiff's product into obscurity.

[14] In terms of actual loss, it is contended that the defendant sold approximately 24,000 infringing garments, which, if priced at RM159 per piece, amounted to a total revenue of RM3,816,000. The plaintiff, however, claimed 50% of this estimated revenue, amounting to RM1,908,000 as aggregate damages.

[15] As to their entitlement to aggravated and exemplary damages, the plaintiff contended that ordinary compensatory damages were insufficient in this case, as the defendant's conduct warranted punitive measures. Aggravated damages were sought on the basis that the defendant's infringement was deliberate, systematic, and caused reputational harm. Whereas exemplary damages is argued to be justified to deter future infringements and prevent the defendant from treating infringement as a mere cost of doing business.

Defendant's Contentions

[16] Learned counsel for the defendant, Azmer bin Md Saad, vigorously opposed the plaintiff's claim, challenging it on several grounds. To buttress this argument, the defendant asserted that the plaintiff had failed to establish a direct causal link between the alleged infringement and any financial loss suffered.

[17] Rather, it is argued that the purported diversion of customers was purely speculative as the plaintiff failed to produce any sales records, financial statements, or customer data to show that its business was affected. The case of *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors*

And Another Appeal [2017] CLJU 500; [2017] 1 LNS 500; [2018] 1 MLJ 784 is relied upon to argue that damages must be based on actual evidence, not mere assumptions.

[18] The defendant highlighted that the plaintiff had been granted a discovery order but chose not to exercise it. To rebut the plaintiff's exaggerated claim, the defendant provided certified financial records showing that only 6,067 units of infringing garments were sold which resulted in a total revenue of RM395,291.

[19] With respect to the question of aggravated and exemplary damages, the defendant categorically refuted allegations of malicious intent, asserting that it neither possessed nor acted with knowledge of the plaintiff's registered design during the product's development phase. Furthermore, the defendant emphasised that upon identification of the potential infringement, it promptly and voluntarily ceased all sales activities as a demonstration of good faith. Regarding exemplary damages, the defendant contended that such remedies should be strictly reserved for instances of deliberate institutional oppression or systemic wrongdoing – a threshold it argued remained unmet in this case, given the absence of any calculated malfeasance or egregious misconduct in its actions.

Court's Findings

Issue 1: Did The Plaintiff Prove Actual Loss Of Profit?

[20] It is a well-established legal principle that the assessment of damages follows one of two approaches: either by calculating the profits earned by the infringing party or by awarding compensation commensurate with the financial loss suffered by the plaintiff (see: *Dormeuil Freres SA & Anor v. Feraglow Ltd & Anor* [1990] RPC 449). In the context of industrial design infringement, s. 35(1) of the Industrial Designs Act 1996 explicitly provides:

> Remedies for infringement
>
> 35. (1) If the owner of a registered industrial design proves that an infringement has been committed or is being committed, the Court may **award damages or an account of profits** and may grant an injunction to prevent further infringement and any other legal remedies.
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> (emphasis added)

[21] The typical principal head of damage would be the loss of business profits arising from the redirection of the plaintiff's customers to the defendant due to the infringement of the defendant. (see: *Prince Manufacturing Inc And Another v. ABAC Corporation Australia Pty Ltd And Another* (1984) 57 ALR 159; [1984] FCA 356; and *Guangdong Foodstuffs Import & Export (Group) Corporation v. Tung Fook Chinese Wine* (1982) Co Ltd And Another HCA011061A/1995).

[22] In *McGregor on Damages* (16th edn), at paras. 1947 to 1948 at pp. 1261 to 1262, it is observed as follows:

> Little attention has been given to the assessment of damages despite the many cases of passing off in the reports. *Spalding v. Gamage* and *Draper v. Trist* are the only cases of importance. The principal head of damage is the loss of business profits caused by the diversion of the plaintiff's customers to the defendant as a result of the defendant's misrepresentation; beyond this, damages may be awarded for any loss of business goodwill and reputation resulting from the passing off. Damages under both these heads were held to be properly awarded in *Spalding v. Gamage* (1918) 35 RPC 101, CA a result which has never since been doubted. *Draper v. Trist* (1939) 3 All ER 513, CA dealt with a more complex situation where the defendant had passed off goods by selling them to middlemen, and there was no evidence that the middlemen resold. In these circumstances it was held that the plaintiff's loss of profits could not be a relevant consideration in assessing the loss but that the plaintiff was entitled to damages by reason of the presence of the deceptive goods on the market, damages which included a sum for loss of reputation. Also, the plaintiff should be able to recover for further loss of profits through reduction of his prices, provided that the reduction is necessary to compete with the goods passed off by the Defendant.

[23] The burden is on the plaintiff to prove the loss actually sustained by reason of the defendant's conduct. Damages for the infringement of intellectual property rights are tortious in nature; with the objective to restore the plaintiff to the position he would have been in had the defendant not infringed. (see: *General Tire and Rubber Co v. Firestone Tire and Rubber Co Ltd* [1975] WLR 819). In the case of *Spalding (AG) & Bros v. AW Gamage Ltd And Benetfink & Co Ltd* [1915] 32 RPC 273, the plaintiff is entitled to "such damages as naturally flow from their unlawful act, and that there is no artificial limitation in the case of a passing off action" (per Lord Parker of Waddington). It cannot also be presumed that the amount of goods sold by the defendant would have been sold by the plaintiff if not for the defendant's unlawful acts (see: *Leather Cloth Company v. Hirschfield* (1865) LR 1 Eq 299 (Court of Chancery)). Speculative and unproven damages are also excluded (see: *The United Horse-Shoe And Nail Co Ltd v. John Stewart And Co* (1888) 5 RPC 260 (Court of Chancery); and *Pneumatic Tyre Co Ltd v. Puncture Proof Pneumatic Tyre Co Ltd* (1899) 16 RPC 209).

[24] In *Taiping Poly (M) Sdn Bhd v. Wong Fook Toh & Ors* [2011] 3 CLJ 837, the Federal Court held that the proper method of calculation for loss of business profit is based on the defendant's sales multiplied by the defendant's profit margin. This method is as expounded by the Court of Appeal in the case of *Wembley Gypsum Products Sdn Bhd v. MST Industrial Systems Sdn Bhd* [2007] 6 CLJ 228; [2007] 2 MLRA 274 wherein the damages for passing off were calculated based on the defendant's sales and defendant's profit margin.

[25] Learned counsel for the plaintiff asserts that, had it not been for the defendant's infringement, the plaintiff would have enjoyed greater sales and market share. The plaintiff even went so far as to estimate that the defendant had sold 24,000 pieces, which, if sold at full price, would have generated RM3,816,000 in revenue. Yet, I am of the considered view that the evidence produced was unconvincing as it primarily relied on publically accessible online communications, which could well have been an attempt to exaggerate sales figures as part of a marketing strategy rather than a true reflection of actual transactions.

[26] I agree with the defendant's submission that the plaintiff failed to produce evidence of sale in respect of the registered designs, its percentage progress of sales, profit before tax, and losses due to the infringed design. Furthermore, the plaintiff's assertion of entitlement to 50% of the sum of RM3,816,000 is entirely without foundation. The plaintiff's reliance on the defendant's recommended sale price, social media account, and promotional video is, at best, tenuous and wholly insufficient in the absence of concrete sales figures. The court must adjudicate on the basis of evidence, not conjecture.

[27] It is imperative to note that the plaintiff had every opportunity to invoke the discovery process to obtain documentary proof of the defendant's actual sales and profit margins but elected not to do so. This omission is not merely unfortunate but a significant lapse. Where evidence is available but not pursued, the court cannot be expected to fill the evidentiary void with speculation.

[28] Conversely, the defendant has presented sales figures verified by its appointed chartered accountant from Venturoso Corporate Services Sdn Bhd, indicating that only 6,067 units of the infringing designs were sold, generating a total revenue of RM395,291. In the absence of any credible evidence to the contrary, these figures must be accepted as conclusive. The burden was on the plaintiff to challenge or disprove this evidence through proper means, yet no such effort was made. Accordingly, the court has no basis to disregard the defendant's professionally verified figures.

[29] With regard to the defendant's reliance on s. 35(3) of the Industrial Designs Act 1996 – namely, the contention that damages should be denied on the basis that they were unaware of the plaintiff's registered designs or had taken reasonable steps to ascertain their registration – I am of the considered view that this argument is belated and untenable in the present circumstances.

[30] A careful reading of s. 35(3) makes it abundantly clear that the discretion to allow or refuse damages or an account of profits is to be exercised at the trial stage, not at the subsequent stage of assessing damages. For ease of reference, I reproduce the provision below:

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(3) The Court may refuse to award damages, or to make an order for an account of profits, in respect of an infringement, if the defendant satisfies the Court –

(a) that, at the time of the infringement, he was not aware that the industrial design was registered; and

(b) that he had, prior to that time, taken all reasonable steps to ascertain whether the industrial design had been registered.

[31] Based on the order dated 10 October 2023, it is patently clear that my learned predecessor had already made a determination ordering damages and an account of profits against the defendant. Any claim for exemption under s. 35(3) ought to have been raised and adjudicated upon at the trial stage, and it is now far too late to revisit that issue at this juncture.

Issue 2: How Should Compensation Be Calculated?

[32] Since actual lost profits have not been established, the law provides another route, *ie*, the notion of a fair royalty. This principle is established in the case of *General Tire and Rubber Co v. Firestone Tire and Rubber Co Ltd* (*supra*) where Lord Wilberforce (at pp. 824 to 826) laid down as follows:

(i) if the plaintiff exploits the patent by manufacturing and selling goods at a profit and the effect of the infringement has been to divert sales to the defendant, the "measure of damages will … normally be the profit which would have been realised by the owner of the patent if the sales had been made by him";

(ii) if the plaintiff commercialises their rights *via* royalty-bearing licenses, "the measure of damages (the defendant) must pay will be the sums which he would have paid by way of royalty if, instead of acting illegally, he had acted legally"; and

(iii) in scenarios where neither a normative profit margin nor an established licensing regime exists, damages must be calibrated to reflect a hypothetically negotiated royalty rate – a sum a willing licensor and licensee would reasonably agree upon for the infringing acts.

[33] Guided by this jurisprudential scaffold, the present case compels recourse to the third limb. The plaintiff, having failed to substantiate quantifiable profit losses and lacking any discernible practice of royalty-based licensing, cannot anchor their claim to the first two categories. Consequently, the court must determine compensation through the prism of reasonableness: What sum would the parties have fairly bargained for, *ex*

ante, to legitimise the defendant's unauthorised exploitation of the design? This approach ensures restitution aligns with commercial realism, eschewing both speculative windfalls and undue leniency.

[34] What, then, is a fair royalty? In this case, I have decided on the figure of 15% of the defendant's revenue as an appropriate measure. I believe that the same is a fair estimation of compensation is grounded in a balanced synthesis of equitable principles and pragmatic commercial reasoning. Given the defendant's documented revenue of RM395,291 from the sale of 6,067 infringing garments, the 15% benchmark aligns with the jurisprudential mandate to approximate a hypothetical licensing agreement that fairly balances the interests of both parties. This percentage neither penalises the defendant excessively nor trivialises the plaintiff's intellectual property rights, reflecting a judicious middle ground that acknowledges the inherent value of the design while respecting the defendant's actual commercial gains.

[35] I also believe that the rate accounts for industry norms, where royalty percentages for design or patent licensing often range between 10% and 20%, depending on factors such as market demand, profit margins, and the uniqueness of the protected work. By anchoring the calculation to the defendant's actual revenue – rather than the plaintiff's speculative projections – the court ensures proportionality and transparency. The resultant sum of RM59,293.65 (15% of RM395,291) thus, serves as a rational and restorative measure, compensating the plaintiff for the unauthorised exploitation of their design while adhering to the evidentiary constraints of the case.

Issue 3: Should Aggravated and Exemplary Damages Be Awarded?

Aggravated Damages

[36] In *Messenger Newspapers Group v. National Graphical Association* [1984] IRLR 397, the English Court of Appeal was directly faced with the question of whether an award of aggravated damages was appropriate to a corporate claimant. The case was one on unlawful interference with business, nuisance (both private and public) and intimidation. Caulfield J stated:

> Certainly exemplary and aggravated damages can be awarded against inanimate legal entities like limited companies, and I cannot see any reason why the same legal entities cannot be awarded aggravated and exemplary damages.

[37] He thus ruled in favour of an award, having regard to the fact that it was companies generally – though not invariably – that were the sort of claimants that suffered damage from intimidation by trade unions and – invariably – unlawful interference with business.

[38] In addition, Caulfield J pointed to the fact that the defendant was reckless in pursuit of its intentions to close down the claimant's business and/or enforce a closed shop, and this it did in defiance of court orders and

with open arrogance. In calculating the aggravated amount due, Caulfield J approached the question of quantum from the perspective of 'the manner of the doing of the injury' and proceeded to award £10,000 in aggravated damages but not without first having 'eliminated human feelings' from his award thus supporting the argument that corporations do not have feelings.

[39] There is nevertheless a conflicting English Court of Appeal decision in *Eaton Mansions (Westminster) Ltd v. Stinger Compania De Inversion S.A.* [2013] EWCA Civ 1308 which held that a company could not recover aggravated damages. In doing so, the court held that *Messenger Newspapers Group Ltd v. National Graphical Association* (*supra*) had, in this regard, been wrongly decided. (See also: *Collins Stewart Ltd v. The Financial Times Ltd* [2005] EWHC 262).

[40] While injured feelings represent one aspect of aggravated damages, the critical determinant is whether the injury was exacerbated by malice, insolence, or an egregious manner of execution. The facts before this court reveal that the defendant not only infringed the plaintiff's registered industrial design but did so deliberately, persistently, and without remorse. Despite being aware of the plaintiff's design rights, the defendant proceeded to market, advertise, and profit from the infringing product on a large scale, leveraging social media, e-commerce platforms, and physical advertising to maximise sales.

[41] Hence, applying the approach of the English Court of Appeal in *Messenger Newspapers Group Ltd v. National Graphical Association* (*supra*), I am of the view that the plaintiff herein is entitled to aggravated damages to reflect the added injury caused by malicious or high-handed behaviour. An award of RM50,000 is, in my view, commensurate with the severity of the injury suffered.

Exemplary Damages

[42] The principles governing the award of exemplary damages were articulated by Lord Devlin in *Rookes v. Barnard* [1964] 1 All ER 367, where he identified two distinct categories of cases in which such damages may be granted:

(i) oppressive, arbitrary or unconstitutional action by the servants of the Government; and

(ii) cases where defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

[43] The plaintiff's claim for exemplary damages in the present case falls squarely within the second category. In *Rookes v. Barnard* (*supra*), Lord Devlin emphasised the necessity of demonstrating that the defendant's conduct was deliberately calculated to generate profit, holding:

(ii)(a) English law recognized the awarding of exemplary damages, that is, damages whose object was to punish or deter and which were distinct from aggravated damages (whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into account in assessing compensatory damages); and there were two categories of cases in which an award of exemplary damages could serve a useful purpose, *viz.*, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, and in the case **where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff.** (emphasis added)

[44] It is significant to note that the plaintiff need not establish that the defendants definitively profited from their wrongdoing. The language employed – "had been calculated" and "might well exceed" – suggests that the plaintiff's burden is to demonstrate only the likelihood that the defendants could have benefitted from the tort.

[45] Further, the following passage of Lord Devlin's judgment in *Rookes v. Barnard* (*supra*) is instructive as to the scope of the second category of cases under exemplary damages:

Where a defendant with a cynical disregard for a plaintiff's rights **has calculated** that the money to be made out of his wrongdoing **will probably exceed** the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. **This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff** some object, – perhaps some property which he covets, – which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

(page 410, letter I & page 411, letter A).

(emphasis added)

[46] First, the use of the phrases "has calculated" and "will probably exceed" emphasises that the plaintiff's burden is to establish the likelihood of profit rather than proving its actual realisation. Secondly, the second category of cases is not limited to strict monetary gains. As Lord Devlin observed, it includes cases where the defendant sought to benefit in other ways, such as securing a commercial or competitive advantage by circumventing legal obligations.

[47] In the context of intellectual property infringement, the assessment of damages often necessitates judicial estimation, as the precise losses suffered by the plaintiff may not be readily quantifiable. Courts have traditionally been cautious to ensure that damages do not become punitive, as tort law is remedial rather than retributive in nature.

[48] However, modern jurisprudence has highlighted a growing concern – namely, that damage assessments in intellectual property cases frequently result in awards akin to a *de facto* compulsory license fee. This allows the infringer to compensate at the lowest conceivable cost, effectively reducing intellectual property infringement to an economically viable risk rather than a legal deterrent. Such an approach threatens the very foundation of intellectual property rights, as it diminishes the owner's control over their own work and fails to reflect the true value of innovation and creativity. If the courts remain overly cautious in awarding substantial damages, they risk emboldening calculated infringement by failing to impose consequences proportionate to the wrongdoing.

[49] It is precisely in such circumstances that exemplary damages serve a crucial function. Where an infringer has deliberately weighed the cost of infringement against the potential commercial gain – and where ordinary compensatory damages fail to capture the full gravity of the wrongdoing – the law must step in with decisive intervention.

[50] In the present case, the defendant's actions were neither inadvertent nor a matter of oversight. Rather, they constituted a calculated and deliberate exploitation of the plaintiff's intellectual property for commercial gain. With vast resources and significant market reach at its disposal, the defendant had every opportunity to ensure that it did not infringe upon another's rights. Yet, it proceeded nonetheless, placing its own commercial objectives above the plaintiff's lawful entitlements. Moreover, the defendant's counterclaim, in which it sought to have the plaintiff's registered designs expunged, further underscores its deliberate course of action. Rather than merely defending against the plaintiff's claims, the defendant actively sought to invalidate the plaintiff's intellectual property rights, reinforcing the view that its actions were not only intentional but also aimed at eliminating any obstacle to its commercial objectives.

[51] The principle must be upheld that those who seek to profit from another's innovation cannot do so with impunity. Intellectual property rights must not be rendered meaningless by allowing infringers to merely absorb the consequences as a negligible expense. To prevent the systemic exploitation of intellectual property and to ensure that infringement is not simply treated as a "cost of doing business," the court must intervene decisively. To reflect the egregious nature of the defendant's conduct and to deter future infringements of this kind, an award of RM100,000 in exemplary damages is imposed.

Decision

[52] Taking all these matters into careful consideration, I have ordered that the defendant shall pay the plaintiff the sum of RM209,293.65 in damages, together with interest at the rate of 5% from 31 December 2020 until full realisation, and assessment costs amounting to RM8,000. For clarity, the element of damages encompasses the following:

(i) general damages of RM59,293.65;

(ii) aggravated damages of RM50,000; and

(iii) exemplary damages of RM100,000;

[53] As for the costs of the main action, it was noted that RM20,000 had previously been awarded for the dismissal of the defendant's counterclaim. However, no costs had been awarded in respect of the plaintiff's main claim. By mutual agreement of the parties, an additional sum of RM20,000 is deemed reasonable to cover the costs of the main claim and is accordingly ordered by this court.